Supreme Court, U.S.
FILED
NOV 28 1994
OFFICE OF THE CLERK

No. 94-662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

SHAUNA M.HUGHES
City Attorney
LIZA CONROY
Assistant City Attorney

City of Henderson
240 Water Street
Henderson, NV 89015
(702) 565-2394

JAMES J. CLANCY
(Counsel of Record)
CAROL A. CLANCY
9055 La Tuna Canyon Road
Sun Valley, CA 91352
(818) 352-2069

Counsel for Petitioners

DOCKETED ON OCTOBER 11, 1994

96 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....ii

I. THE RESPONSE BRIEF FILED BY NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. HAS MISREPRESENTED THE TRIAL FACTS AND MISSTATED THE SINGLE LEGAL ISSUE WHICH IT HAS CHALLENGED..... 1

II. STATEMENT OF THE CASE..... 4

(A) THE LICENSE REVOCATION ORDER DID NOT BECOME FINAL BECAUSE: (1) IT WAS "STAYED" AT THE REQUEST OF NEVADA ENTERPRISES FOR 10 DAYS TO PERMIT IT TO PERFECT A "PROPER" APPEAL; AND (2) THE 10 DAY STAY WAS EXTENDED INDEFINITELY BY THE COERCIVE FORCE OF NEVADA ENTERPRISES U.S. DISTRICT COURT RESTRAINING ORDER AND INJUNCTION AND THE COURT OF APPEALS INJUNCTION..... 4

(B) THIS COURT'S RESOLUTION OF THE ABOVE ISSUE SHOULD BE DISPOSITIVE OF THE REMAINING SUBSIDIARY ISSUES WHICH NEVADA ENTERTAINMENT HAS NOT ADDRESSED.....16

III. CONCLUSION: THE CONSTITUTIONAL QUESTIONS RE ELEVENTH AMENDMENT STATE RIGHTS, HUFFMAN ABSTENTION, AND SUBJECT MATTER JURISDICTION ARE RIPE FOR RESOLUTION.....20

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140..... 7

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).....2, 4, 9, 11, 14, 19, 20

Luian v. Defenders of Wildlife, et al., 504 U.S. ___, 119 L.Ed.2d 331..... 7

Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993).....17

Newman-Green, Inc. v. Alejandro Alfonzo-Larrain et al., 490 U.S. 826 (1989)..... 7

Ohio Civil Rights Commission v. Dayton Christian Schools, Inc. 477 U.S. 619 (1986).....2, 3, 4, 16, 17, 20

Watson v. Buck, 313 U.S. 367 (1941)..... 9

STATE CASES

City of Las Vegas v. Nevada Industries, 772 P.2d 1275.....18

CONSTITUTIONAL PROVISIONS

United States Constitution
Amendments
Eleventh.....2, 6, 7, 9, 10, 11, 15, 18, 19, 20

TABLE OF AUTHORITIES

PAGE

FEDERAL STATUTES

42 U.S.C.
Section 1983..... 6
Section 1988.....13

FEDERAL RULES

U.S. Supreme Court Rules
Rule 15.1 16
Rule 16.1 17

TEXTS

Stern, Gressman, Shapiro and Geller, Supreme Court Practice, (Seventh Ed.).....18

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 94-662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

I. THE RESPONSE BRIEF FILED BY NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL. HAS MISREPRESENTED THE TRIAL FACTS AND MISSTATED THE SINGLE LEGAL ISSUE WHICH IT HAS CHALLENGED.

At pp. 2 and 5 of the Response Brief filed on November 9, 1994, Nevada Entertainment Industries, Inc. et al. (hereinafter "Nevada Entertainment") has mischaracterized both the trial facts and the single legal issue which Nevada Entertainment has challenged. See p. 2, reading:

> "The separate Petition filed by the City of Henderson (the instant case) raises an issue which this Court having previously and expressly left open, should now resolve." (Our Emphasis.)

See page 5, reading:

> In the instant case, Respondents filed their civil rights action after the decision of the City Council became final. Thus, if this Court grants certiorari in this case it will have the opportunity to resolve this open question." (Our Emphasis.)

In this Reply Brief, the City of Henderson submits that the excerpts of record on Nevada Entertainment's appeal and the City of Henderson's Cross-Appeal and the appellate records in this Court in

Case Nos. 90-1771, 92-643, and 93-1969 and at pages 7-29 of this Petition for Writ of Certiorari in Case No. 94-662, establish both as a historical fact and as a matter of law that the federal civil rights complaint which Respondent Nevada Entertainment, a citizen of the State of Nevada, filed in the U.S. District Court for the District of Nevada on April 24, 1990 directly interfered with the progress of the State of Nevada quasi-judicial (administrative) proceeding, which was then pending, and that said filing of a federal civil complaint of that nature, regarding a quasi-judicial matter which is properly before a Nevada tribunal, by a Nevada State citizen: (1) is forbidden by the Eleventh Amendment (i.e. the federal court lacks "subject matter jurisdiction"), and (2) was prohibited by this Court's landmark "abstention" decision in 1975 in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, and its more recent "binding" holding in 1986 in Ohio Civil Rights Commission v.

Dayton Christian Schools, Inc., 477 U.S. 619, at 629.

Nevada Entertainment's statement that the procedural historical facts in the trial court below are that: "Respondents filed their civil rights action after the decision of the City council became final" is an "egregious" misstatement of the trial record on appeal because: (1) an "abstract" statement of this nature, without reference to the record, is pointless; (2) it is true, both as a historical fact and as a matter of law, that the temporary restraining order and the preliminary injunction which were issued in Nevada Entertainment's federal civil rights action actually prevented the City Council's quasi-judicial order from becoming "final;" (3) it is true, both as a historical fact and as a matter of law that, from a procedural viewpoint the trial facts in this Petition cannot be distinguished from the trial facts in this Court's binding precedent in 1986, in Ohio Civil Rights

Commission v. Dayton Christian Schools, Inc., 477 U.S. 619, at 629 (1986), which extended the abstention doctrine expressed as to State judicial proceedings in Huffman v. Pursue, Ltd., 420 U.S. 592, at 608, to include quasi-judicial administrative proceedings; and (4) during the four years of litigation, three prior petitions on file in this Court have correctly stated and given notice that the record herein tracks the trial facts in Huffman, supra, which is binding upon the federal courts and Respondent has, nevertheless, recklessly continued to litigate. See "Statement of Facts" in No. 90-1971 at p. 22, 92-643 at pp. 5-12 and 19; 93-1969 at p. 15, and 94-662 herein, at pp. 4-36 generally, pp. 10-11 specifically.

II. STATEMENT OF THE CASE

(A) THE LICENSE REVOCATION ORDER DID NOT BECOME FINAL BECAUSE: (1) IT WAS "STAYED" AT THE REQUEST OF NEVADA ENTERPRISES FOR 10 DAYS TO PERMIT IT TO PERFECT A "PROPER" APPEAL; AND (2) THE 10 DAY STAY WAS EXTENDED INDEFINITELY BY THE COERCIVE FORCE OF NEVADA ENTERPRISES U.S. DISTRICT COURT RESTRAINING ORDER AND INJUNCTION AND THE COURT OF APPEALS INJUNCTION.

At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief).

The concluding paragraph of the City Council's written order, dated April 16, 1990, which was served on Nevada Entertainment, read as follows (see Appellant's Excerpts Exhibit 1, pp. 2-3):

> "Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a/ FANTASY VIDEO PLUS, orders written notice of its decisions to licensees within five

(5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

[Signatures of Council]"

As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still "pending" up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day "stay" period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring "subject matter jurisdiction" on such

date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief.

The date ("April 24, 1990") is of paramount importance, because "the existence of federal 'subject matter jurisdiction' ordinarily depends on the facts as they exist when the complaint was filed in the U.S. District Court." See Lujan v. Defenders of Wildlife, et al., 504 U.S. ___, 119 L.Ed.2d 331, at fn. 4, emphasizing the above language and citing Newman-Green, Inc. v. Alejandro Alfonzo-Larrain et al., 490 U.S. 826, 104 L.Ed.2d 893, 109 S.Ct. 2718 (June 12, 1989) at 900; see also Federal Express Corp. v. Tennessee Public Service Commission, et al., 738 F.Supp. 1140, at 1143:

> "As a general rule, the proper point of reference for determining whether state proceedings are 'ongoing' is

the date the federal complaint is filed. In Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), the Court applied the day-of-filing rule and held that abstention was appropriate, even though the state proceedings had run their course by the time the matter reached the Supreme Court and dismissal would leave Texaco without any state remedy. 481 U.S. at 17-18, 107 S.Ct. at 1529-30....See also Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (rejecting argument that state judicial proceedings had ended by time federal complaint was filed); Steffel v. Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974) (holding that Younger principles did not apply where no state criminal proceedings is pending when federal complaint is filed); Thomas v. Texas State Bd. of Medical Exam, 807 F.2d 453 (5th Cir. 1987) (abstention not appropriate where plaintiff voluntarily dismisses state claim before filing federal suit).

"....

"The Younger line of authority is concerned primarily with respecting the sovereignty, integrity, and competence of state systems, and with allowing the state systems to operate without undue interference from the federal government. See, e.g., Younger, 401 U.S. at 44, 91 S.Ct. at 750; Huffman, 420 U.S. at 601-04, 95 S.Ct. at 1206-08. This line of authority admonishes federal courts to refrain from intruding into the state process in a manner that 'reflect[s] negatively upon the state court's ability to enforce constitutional principles.' Cf. Huffman, 420 U.S. 604, 95 S.Ct. at 1208; Steffel, 415 U.S. at 462, 94 S.Ct. at 1217."

A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have "subject matter jurisdiction" on April 24, 1990, must, of necessity, follow from the "command" of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that "command" in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387 (1941). See also Questions I-IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii. a copy of which is attached at Appendix 3 to this Brief. It follows therefrom that Nevada Entertainment used the power of the federal court in an unlawful (Eleventh Amendment violation) tortious and unconstitutional manner, through the issuance and

enforcement of an unlawful (Eleventh Amendment violation) tortious, unconstitutional federal court temporary restraining order (April 27, 1990) and an unlawful (Eleventh Amendment violation) tortious, and unconstitutional preliminary injunction (May 30, 1990) (See copy of Injunction Orders in Appellants' Excerpts of the Record at Exhibits 2 and 3), to: (1) extend the City Council's 10 day stay indefinitely, and (2) unlawfully, tortiously, and unconstitutionally prevent the City Council's quasi-judicial Order of April 16, 1990 from becoming a final enforceable order, which could be used to execute the will of the City Council acting as an agent for the Sovereign State of Nevada.

Petitioner City of Henderson contends that the "impasse" which such injunction order created was subjectively brought to the attention of U.S. District Court Judge Lloyd D. George in June of 1992 when he first attempted to force the City to trial in the federal Court against its will.

Prior thereto, the City had added defensive pleas of "Res Judicata" and "collateral estoppel" to its continuing plea of "lack of subject matter jurisdiction." At that time, Judge Lloyd D. George must have become aware of the Eleventh Amendment impasse which arose out of the City's Huffman abstention challenge; i.e. that the City Council's quasi-judicial order of revocation had been "stayed" by his injunction order, and had not become final and, therefore, such pleas of "res judicata" and "collateral estoppel," though pleaded, would not be available to the City as a defense in the federal trial; for, at that time, and, on his own motion, he reversed his initial ruling, suspended the trial procedure and, thereafter, certified the matter for an interlocutory appeal to the Ninth Circuit. See Statement of Facts in the Petition herein at pp. 22 and 23.

The "impasse" which was created by such federal injunction order was also

brought to Nevada Entertainment's attention after U.S. District Court Judge Lloyd George filed his final judgment on November 27, 1992 (see copy in Appellants Excerpts of Record, at Exhibit 7). At that time, Nevada Entertainment filed a petition for rehearing with the City Council, which must be interpreted as a recognition and judgment on its part that the matter was still "pending" before the City Council because the federal court's temporary restraining order and preliminary injunction order which it served on the City had indefinitely extended the stay which it had obtained from the City Council to allow it to take a "proper" appeal. However, the City Council could not act on the matter because the trial court's injunction, which U.S. District Court Judge Lloyd George had lifted, was immediately continued -- this time at the request of Nevada Entertainment and at the instance of the Ninth Circuit Court of Appeals -- and has not yet been lifted. The Parties

by stipulation, have stayed the mandate to await this Court's ruling on this matter, including the City's right to recover attorney's fees as a prevailing defendant under the Dayton Christian Schools case and 42 U.S.C. Section 1988, and damages under the injunction bond which the United States District Court set when the federal court's injunction was placed in effect. (See Statement of Facts in the Petition herein at p. 28).

The trial facts clearly establish that Nevada Entertainment's Attorney did not (as it might have done) wait until May 2, 1990 to file its federal lawsuit, on which date the City Council's 10 day stay order would have lapsed, and the City Council's revocation order would then have "become" final. Such a fact situation (not here present)[1] would have presented a

---

[1] For an example of an attempt to state such a case (not here present), see (Footnote Continued)

different case and controversy and different federal questions as to whether, in such cases, a federal plaintiff could show, by extinsic evidence that the Huffman abstention doctrine did not apply because he was bringing a new and independent case in the U.S. District Court, and

---

(Footnote Continued)
the petition for writ of certiorari in Nevada Entertainment Industries, Inc. et al. v. City of Henderson et al., No. 94-786 which was docketed on October 7, 1994, and served on the City of Henderson by mail on October 29, 1994. Because the petition herein establishes that the Eleventh Amendment does not permit Nevada Entertainment to file a federal lawsuit under the historical facts set forth herein in Case No. 94-662, the City of Henderson considers the filing of Case No. 94-786 to be a "frivolous" filing, and has addressed that issue in the Supplemental Brief which is being filed concurrently with the Reply Brief herein (case No. 94-662) and will further address that issue and Nevada Entertainment's untrue Statement in this Petition at p. 7, reading:

> "The Ninth Circuit rejected Respondents' position initially before it withdrew its opinion and replaced it with its second opinion."

in a Response Brief and Cross-Petition in Case No. 94-786. See, also, Statement of Facts in the petition herein in No. 94-662 at pages 38-39.

had abandoned the litigation in his state case, and was willing thereby to accept and suffer the potential risk of defeat under a "res judicata" and "collateral estoppel" defense.

Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the

City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986).

Petitioner City of Henderson respectfully submits that the factual differentiation which Nevada Entertainment is now attempting to make to establish "standing" at this late stage (to justify the filing of its frivolous Petition for Writ of Certiorari in No. 94-786), is not available. (See fn. 1 on p. 13, supra.)

(B) THIS COURT'S RESOLUTION OF THE ABOVE ISSUE SHOULD BE DISPOSITIVE OF THE REMAINING SUBSIDIARY ISSUES WHICH NEVADA ENTERTAINMENT HAS NOT ADDRESSED.

The duty of a Respondent to respond in a brief in opposition to a Petition for Writ of Certiorari is set forth in Rule 15.1 as follows:

> "Brief in Opposition.
> "...the brief in opposition should address any perceived misstatements of fact of law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted.... Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements in the brief in opposition, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition."

Further, Rule 16.1 provides that, after consideration of the papers, the Court may make a summary disposition of the merits. Because the record on appeal herein is clear that this Court's decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) is a binding precedent and controls the disposition of this case [which the Ninth Circuit so held in its first opinion in Nevada Entertainment Industries, Inc. v. City of Henderson, 8 F.3d 1348 (1993)], see Statement of Facts in the Petition herein at pp. 38-39, this Court is presently empowered to grant summary relief to

Petitioner without setting the issue for oral argument. See Stern, Gressman, Shapiro, and Geller, Supreme Court Practice, Seventh Edition at pp. 250 et seq., "(c) Summary Disposition of the Merits by Per Curiam Opinion." Petitioner submits that such a disposition would not be proper in this case because of the preeminent importance of the City of Henderson's additional claims of: (1) Eleventh Amendment injury and (2) the federal court's lack of subject matter jurisdiction, both of which are of national interest to all of the states.

Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989), see copies at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the

States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., Case No. 94-786. Further, there is a continuing problem in the Ninth Circuit and other Circuits, with the correct application of the test to be applied in ruling on Huffman abstention challenges, and a serious need for a comprehensive opinion of this Court to settle the present abstention problem and controversy in the Ninth Circuit; that is, the divergent views of the 38 individual Ninth Circuit Court judges, and a refusal of some: (1) to "recognize" the Eleventh Amendment foundation of the Huffman abstention challenge, and (2) to defer in proper cases to the sovereign right of state courts to rule on important State interests under the Eleventh Amendment. This issue is further addressed in a Supplemental Brief in Case No. 94-662 and in the City's

Cross-Petition to Nevada Entertainment in Case No. 94-786, concurrently being filed.

III. CONCLUSION: THE CONSTITUTIONAL QUESTIONS RE ELEVENTH AMENDMENT STATE RIGHTS, HUFFMAN ABSTENTION, AND SUBJECT MATTER JURISDICTION ARE RIPE FOR RESOLUTION.

Petitioner cannot envision a "riper" "test case" in which to examine the merits of the City's claim that the refusal to apply Huffman abstention doctrine is the direct cause of the City's Eleventh Amendment injury. The Statement of Facts clearly documents: (1) a refusal of the U.S. District Court and the Ninth Circuit Court of Appeals to apply the "binding" rule of law established by this Court in its Huffman and Dayton Christian Schools abstention decisions; (2) judgments of both Courts which contravene the State of Nevada's rights under the Eleventh Amendment; and (3) Eleventh Amendment constitutional injury to the City of Henderson and the State of Nevada which is patent on the face of the record.

Dated: November 26, 1994

James J. Clancy

APPENDIX 1

STATEMENT OF FACTS IN PETITIONER'S SUPPLEMENTAL BRIEF IN NO. 92-643, AT PAGES 4-12.

[Refer: pp. 5 & 15 of Reply Memorandum.]

Text at page 5 reads:

"At the conclusion of the revocation hearing on April 10, 1990, the City of Henderson City Council orally voted to revoke the business license of Nevada Enterprises and, at the specific oral request of its counsel, Roger Jon Diamond, orally granted a stay of 10 days as was authorized by the newly enacted Henderson Municipal Code, to permit attorney Diamond to appeal its written quasi-judicial order to the Nevada State District Court (see the Statement of Facts in Petitioner's Supplemental Brief in No. 92-643 at pp. 4-12, a copy of which appear at Appendix 1 to this Reply Brief)."

Text at page 15 reads:

"Nor did Nevada Entertainment limit its prayer in the federal complaint to a request for declaratory relief. A different case and controversy and different federal questions would also have been presented, had Nevada Entertainment sought only a declaratory relief and not the injunction order (also not this case), such as questions of fact re his mens rea in relation to the City's claim of an alleged reckless Eleventh Amendment violation.

"Instead, Nevada Entertainment deliberately chose to collaterally attack the quasi-judicial fact finding of "fraud" made by the City Council in the federal court rather than in the state court (as could have been done -- see Appendix 1, at p. 1-6 to this Brief), and sought and obtained injunctive relief against the City which was acting as an agent for the Sovereign State of Nevada, in open defiance of the Eleventh Amendment command and this Court's binding "abstention" precedent in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986)."

STATEMENT OF FACTS

(A) FACTS TAKEN FROM THE RECORD.

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses which required application for a conditional use permit.

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a business license.

(B) FINDINGS OF FACT TAKEN FROM UNITED STATES DISTRICT COURT JUDGE GEORGE'S DECISION.

At pages 7 and 8 of its Decision, United States District Court Judge George made the following findings of fact (see Appendix A at pages 7 and 8):

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the

plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected,

submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

(C) CONTINUATION OF FACTS TAKEN FROM THE RECORD.

At the state license revocation proceedings, the City Council determined that federal plaintiffs'

misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues which were presented in the federal civil rights action.

The administrative enforcement hearing resulted in the City Council's written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for ten days, in order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by Henderson Municipal Code, H.M.C. Section 4.06.160. See also the concluding request of

licensees' attorney, Mr. Diamond at the hearing on the license revocation:

> "....if you do vote for revocation, which I earnestly ask you not do, we would ask that the Council stay its order revoking the license, which this Council is empowered to do under the provisions of the ordinance, to give us a chance to file a lawsuit against the City of Henderson and the individual Councilmembers under the Federal Civil Rights Act which is applicable either in the State court or the Federal court, to give us a chance to sue the Council, its individual members and the City for monetary damages for deprivation of my clients federally protected civil rights. If the Council has any questions or comments, I'd be glad to try to

answer them. Thank you very much." (Our emphasis.)

Instead of appealing the City Council's administrative factfinding and license revocation in state court as authorized by the City Council, licensees filed this action in federal court as a defense to the City's enforcement action during the period in which the issue was still pending because of the stay and the ten day statutory period allowed by the City Council to appeal the City's action within the state judicial system, thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. On June 4, 1990, following

oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court preliminarily enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed.

After further study of the United States Supreme Court's opinion in Huffman v. Pursue, Ltd., supra, the City of Henderson declared their refusal to consent to federal jurisdiction [see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990); and (2) a motion to dismiss the Civil Rights

lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based (Huffman v. Pursue, Ltd.), and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present their federal constitutional claims in the State lawsuit; that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

ARGUMENT

THE FINDINGS OF FACT AND ERRONEOUS CONCLUSIONS OF LAW IN THE FEDERAL TRIAL COURT'S DECISION OF NOVEMBER 27, 1992 ARE SO EGREGIOUS AS TO MANDATE IMMEDIATE RELIEF UNDER HUFFMAN V. PURSUE, LTD. AND WATSON V. BUCK AS TO THE PETITION FOR WRIT OF CERTIORARI IN NO. 92-643.

APPENDIX 2

COPY OF FEDERAL COMPLAINT

[Reference: pages 6 and 7 of Reply Memorandum.]

Text at pages 6-7 reads:

"As Nevada Entertainment has pleaded in its federal complaint, the City Council's order was to become final on May 1, 1990 [see paragraph 51 of Complaint for Declaratory and Injunctive Relief in Appellant's Excerpts of Record at Exhibit 1, p. 21; and a copy of the federal complaint at Appendix 2 to this Brief, and paragraph 51 therein at p. 2-32], and therefore, was still 'pending' up to and including April 30, 1990. However, on April 24, 1990, and before said City Council order could become final (during the City Council's 10 day 'stay' period) and in the face of the Eleventh Amendment proscription (which, per force, was self-operating and precluded a Federal Court from acquiring 'subject matter jurisdiction' on such date), Nevada Entertainment, a Nevada Corporation, recklessly filed its civil rights complaint (see copy at Appendix 2 to this Brief) in the U.S. District Court under 42 U.S.C. Section 1983 and recklessly asked for both Declaratory and Injunctive Relief."

ROGER JON DIAMOND
2115 Main Street
Santa Monica, CA 90405

(213) 399-3259

State Bar No. 40146

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., a Nevada corporation and DANIEL BISHOP Plaintiffs, vs. CITY OF HENDERSON, a Nevada Municipal corporation, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON, Defendants.	CV No. CV-S-90-264-LDG-LRL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF. FILED: APRIL 24, 1990

Plaintiffs, Nevada Entertainment Industries, Inc. and Daniel Bishop allege as follows:

1. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1343(3) and 42 U.S.C. §1983 in that this is an action by

Plaintiffs with regard to their attempt to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution; they are seeking to enjoin the Defendants from closing their constitutionally protected business.

2. Venue lies in the Southern Division of the District of Nevada; the City of Henderson is located in Clark County, Nevada, which is within the jurisdiction of the Southern Division.

3. Plaintiff Nevada Entertainment Industries, Inc., is, and at all times mentioned herein, was a corporation duly authorized and created by the laws of the State of Nevada. Plaintiff Daniel Bishop at all times mentioned herein, was and is the President of Nevada Entertainment Industries, Inc. and would be subject to criminal sanctions should Defendants not be enjoined from closing the subject business.

4. Defendant City of Henderson was and is, at all times mentioned herein, a

municipal corporation duly created by the laws of the State of Nevada and was and is located within Clark County and the Southern Division of the District of Nevada.

5. Defendant James Goff is sued in his official capacity as Chief of Police of the City of Henderson.

6. This action relates to the attempt by Plaintiffs to operate a bookstore and motion picture arcade protected by the First and Fourteenth Amendments to the United States Constitution. The business is known is Fantasy Video Plus and is located at 1100 North Boulder Highway, Henderson, Nevada.

7. Defendants contend that the business in question (Fantasy Video Plus), is an adult business within the meaning of Henderson Municipal Code §19.16.006(B). For the purpose of this lawsuit, Plaintiffs will concede that the subject business, Fantasy Video Plus, is an adult business within the meaning of §19.16.006(B) of the Henderson Municipal Code.

8. On February 17, 1989, Plaintiffs

desired to commence a business in the City of Henderson wherein books, magazines and novelties would be sold and motion picture films (video tapes) could be sold and/or rented and exhibited. Plaintiffs desired, with respect to such business, to sell, rent, and exhibit materials protected by the First and Fourteenth Amendments to the United States Constitution.

9. Plaintiffs located a parcel of property at 1100 North Boulder Highway, Henderson, Nevada. On February 17, 1989, Plaintiffs entered into a five year lease for the premises at 1100 North Boulder Highway, Henderson, Nevada 89015. The premises consisted of a structure with 3,200 square feet of floor area. The lease would commence on April 1, 1989 and last until April 1, 1994.

10. At the time the lease was made, the City of Henderson had already enacted (May 1983), Chapter 4.102 of the Henderson Municipal Code regarding "video rental stores."

11. Henderson Municipal Code §4.102.020 required all "video rental stores" (defined as establishments which derived its gross profits from the sale or rental of sexually explicit movies, films or tapes) to certify that no such films would be sold or leased to persons under the age of 21.

12. With the exception of Chapter 4.102, Defendant City of Henderson did not further regulate premises selling or renting "adult films."

13. It was the intention of Plaintiffs to exhibit, sell, and/or rent the kinds of materials described in Chapter 4.102 of the Henderson Municipal Code (video rental stores).

14. The general requirements for obtaining a business license were set forth in Title 4 of the Henderson Municipal Code entitled "Business Regulations and License."

15. On March 7, 1989, after Plaintiffs executed their lease on February 17, 1989, Defendant City of Henderson adopted

Ordinance No. 1112 which repealed in its entirety former Chapter 4.04 entitled "Business Regulations and Licenses" and which replaced it with a new Chapter 4.04 entitled "Business Regulations and Licenses."

16. Accordingly, since the adoption of Ordinance No. 1112 on March 7, 1989, Defendant City of Henderson has been regulating businesses and has been determining whether or not to issue business licenses based upon the provisions of the new Chapter 4.04 which was adopted by Ordinance No. 1112.

17. By virtue of Henderson Municipal Code §4.04.020, all businesses in the City of Henderson must have a license issued by the City of Henderson.

18. Henderson Municipal Code §4.04.020 provides as follows:

> "(a) It shall be unlawful for any person to commence, carry on, engage in or continue in the City any business without first

obtaining a license and paying the appropriate license tax as provided by terms and provisions of this Title.

(b) A license shall only be issued if the applicant has a fixed place of business from which the business will be conducted, unless the Title specifically states otherwise. Once issued a license, the licensee shall not engage in business from any other premises other than the one for which the license was issued.

(c) No licensee shall allow another person to display a license on the licensee's premises, or to in any way allow any other person to use the licensee's premises to conduct business unless expressly permitted by the Division.

(d) Upon the filing of a

complete and accurate business license application and the payment of all required license fees, the applicant may be issued a temporary business license by the Division; provided, however, that the requirements of all appropriate federal, state, and county regulatory agencies have been met; and that the requirements of all Departments or Divisions of the City have been meet and properly approved. The temporary business license shall permit the applicant to engage in the business designated at the location so stated for a period of up to, but not to exceed sixty (60) days, within which all inspections and requirements imposed upon the applicant by the various Departments or Divisions of the City are to be complied with.

Upon the recommendation by the various Departments or Divisions within the City, the Division shall have the discretion to extend a temporary business license for a period of an additional sixty (60) days. It shall be the sole responsibility of the applicant to schedule all follow-up inspections necessary to comply with all the requirements and corrections. Should the applicant have not met the requirements as set forth by the Departments or Divisions of the City within the maximum prescribed time limit of one hundred twenty (120) days, the temporary license shall be deemed expired. Continued operation of the business shall constitute a violation of this Title, and the business shall be subject to legal action as prescribed by

this Title, the penalties for which are described in Section 4.04.230.

(e) The above stated provisions for a temporary business license shall be in addition to those provisions applying to privileged business licenses or any business which requires formal approval by the Council, unless the Director has first given tentative approval in accordance with section 4.04.170.

19. Henderson Municipal Code Section 4.04.150 sets forth the grounds for denial, non renewal, suspension, limitation and revocation of licenses. Specifically, Section 4.04.150 provides as follows:

"It is expressly declared that the provisions of this section are applicable to any license or permit issued or applied for, or pursuant to any chapter of this Code. Thus, the provisions of

this section are in addition to any grounds for denial, non-renewal, suspension, limitation and revocation set forth for specific businesses or trades in other chapters of this title.

(a) Any license or permit application made pursuant to the provisions of this title may be denied for good cause by the Division or by the Council. Good cause for denial of a license or permit shall include, but not be limited to:

(1) The license application is incomplete so as to not contain all information required by this Title;

(2) All license and investigation fees are not paid;

(3) False or fraudulent statements

in the application for the license;

(4) Failure to obtain a license or permit as required by this Title and compliance with all other Department or Division requirements prior to engaging in business;

(5) The applicant, or any of its principals, do not qualify for, or have not obtained work card identification as may be required by the Division;

(6) A finding by the Division or by the Council that said business will not comport with the peace, health, safety, convenience, good

morals, or the general welfare of the public; (7) Lack of fitness of the applicant to engage in the particular occupation of business. For the purpose of this section, lack of fitness shall be defined as that quality or character of the license applicant which tends to establish that the applicant will not perform the services to be provided under his license or permit in a reasonable manner to the public. Particular factors to be taken into consideration by the Division or by the Council in determining whether the applicant

is unfit, are whether the applicant has a bad moral character, has intemperate habits or a bad reputation for truth, honesty, or integrity, or has a prior criminal conviction and/or a prior license denial, suspension, limitation or revocation, either locally or in another state or community, to the extent that it is possible that the acts which formed the basis of the conviction, denial, suspension, limitation, or revocation may be committed by the applicant under the license or permit being

applied for. In the event the applicant is a company, partnership, association, corporation, or other business entity, the Division or the Council may consider the fitness of each of the applicant's owners, partners or directors.

(8) For any other cause by the City through its Division or Council to be a just or equitable reason.

(b) Non-renewal. The Division may refuse to renew any business license or permit for any reason which would have justified a denial of the original application for a license or permit. Refusal to renew shall include, but not be limited to

the following:

(1) The conduct of the business in an unlawful, improper, or irregular manner;

(2) Failure to comply with all City, county, state or federal laws;

(3) Upon the recommendation of a Department or Division within the City of noncompliance to City ordinances or business activities not in the best interest of the City;

(4) The existence of unsanitary conditions at, near, or in the premises which causes or tends to create a public nuisance or which injuriously

affects the public health, safety or general welfare;

(5) Failure to truthfully disclose any of the information required by the Division or the failure to make full disclosure of all the facts required by the Henderson Municipal Code.

(6) The commission of, or permitting or causing the commission of any act in the operation of the business which act is made unlawful or is prohibited by any ordinance of the City, county, state or federal government;

(7) For any other cause by the City through its Division or its Council to be a just or equitable reason.

(c) All business licenses issued under this Title, shall be subject to suspension, limitation or revocation by the Council for failure of such licensee, his agents, servants, or employees while engaged in the conduct of business, to comply with any of the provisions of this Code. The Council may, upon complaint, or upon its own motion, cause any licensee to appear before it at any time to show cause why the license of any licensee shall not be suspended, limited or revoked in accordance with Chapter 4.06 as applicable."

20. Henderson Municipal Code §4.04.200

authorizes certain Henderson officials to enforce the ordinance by citations and arrests. Those with enforcement powers include police officers as well as the Director of Licensing and his agents.

21. Henderson Municipal Code §4.04.220 provides that the violation of any provision of the Code is a misdemeanor.

22. Shortly after Defendant City of Henderson adopted Ordinance No. 1112, portions of which are quoted above, the City of Henderson also adopted Ordinance No. 1120, which enacted Titles 18 and 19 of the Henderson Municipal Code. Ordinance No. 1120 was a comprehensive revision of the Zoning Code and zoning law of the City of Henderson. On April 4, 1989, by Ordinance No. 1120, Defendant City of Henderson repealed its prior ordinances regarding zoning, and, as stated, replaced them with a new comprehensive "Development Code." Said Development Code purported to regulate zoning in the City of Henderson and still purports to regulate zoning in the City of

Henderson.

23. Prior to April 4, 1989, it was lawful for Plaintiffs to operate their proposed business at the property leased by them on February 17, 1989. That is, the property was commercial in nature and permitted the establishment of the business intended to be operated by Plaintiffs.

24. At the time Plaintiffs leased their property for the business in question, their property was zoned commercial (CC).

25. However, after the adoption of Ordinance No. 1120 on April 4, 1989, the City of Henderson purported to regulate where "adult businesses" could be located in the City of Henderson. That is, the effect of Ordinance No. 1120 adopted April 4, 1989, was to prevent Plaintiffs from commencing the business they intended to commence when they first leased the property on February 17, 1989.

26. Ordinance No. 1120 purported to allow adult businesses to exist only in one zone of the City of Henderson, the newly

created "CH" zone.

27. Section 19.16.006(B) of the Henderson Municipal Code provides as follows (Ordinance No. 1120):

> "Adult Businesses. Establishments based primarily on materials or performances that depict, describe, or relate to "specified sexual activities", as defined in Chapter 19.12."

28. Section 19.12.006(DE) of the Henderson Municipal Code provides as follows:

> "Sexual Activities, Specified: Human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse, oral copulation, or sodomy; fondling or other erotic touching of human genitals (pubic region) buttocks, or female breasts."

29. Section 19.24.002 of the Henderson Municipal Code specifies the following with

respect to the "CH" Highway commercial district zone":

> "To provide sites for the auto-oriented commercial uses, including hotels, motels, service station, car washes, automobile sales and services, drive in restaurants, offices, limited warehousing and commercial services."

30. By virtue of Henderson Municipal Code §19.24.004, adult businesses, including bookstore and motion picture arcades, were and are only permitted in the "CH" zone and, within such zone, allowed only "with use permit, subject to location requirements set forth in Henderson Municipal Code Licensing Regulations."

31. After Defendant City of Henderson adopted its revised zoning law on April 4, 1989, no parcel of property in the City of Henderson was zoned "CH." Thus, nowhere in the City of Henderson could one lawfully operate an adult business, such as an adult

bookstore and arcade. Although the City of Henderson adopted the zoning provisions quoted above on April 4, 1989, the City did not establish any zone known as the CH zone. Thus, after April 4, 1989, the City of Henderson effectively prohibited adult bookstores and arcades from operating anywhere within the City of Henderson, in violation of the First and Fourteenth Amendments to the United States Constitution (Schad v. Borough of Mount Ephraim, 452 U.S. 61 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

32. Since the City of Henderson after April 4, 1989 effectively banned throughout its territory all adult bookstores and arcades by zoning ordinance, the zoning ordinance was a nullity, being unconstitutional on its face. In effect, the City of Henderson by violating the principles set forth by the United States Supreme Court in Schad v. Borough of Mount Ephraim, supra, had no zoning law regarding adult bookstores

and motion picture arcades.

33. Although, as stated above, Defendant City of Henderson totally prohibited adult bookstores and arcades from operating anywhere in the City of Henderson, in violation of the First and Fourteenth Amendments to he United States Constitution, Defendant City of Henderson also required that any such business obtain both a business license and a conditional use permit.

34. One may not obtain and/or retain a business license from Defendant City of Henderson if one's business is not zoned properly or if it does not have a required conditional use permit.

35. In addition to needing a business license as set forth above, Plaintiffs also needed a conditional use permit pursuant to Section 19.74.012 of the Henderson Municipal Code.

36. In order to obtain a conditional use permit, Plaintiffs would have to establish and the City Council would have to

find, among other things,

"That the proposed location of the use and the proposed conditions under which it would be operated or maintained will be consistent with the Comprehensive Plan; will not be detrimental to the public health, safety, or welfare of persons residing or working in or adjacent to the neighborhood such use; and will not be detrimental to properties or improvements in the vicinity or to the general welfare of the City. . . ."

37. As stated above, after April 4, 1989, the City of Henderson was maintaining and did maintain an unconstitutional system with respect to adult bookstores and motion picture arcades in that, among other things, there was no property zoned CH and therefore no property on which such a business could be operated; in addition, even if there were such properties zoned CH, such business

would have to obtain a business license under the standards set forth above and also obtain a conditional use permit under the standards set forth above, such standards being unconstitutionally vague and unenforceable.

38. On August 31, 1989, Plaintiffs duly filed their application for business license. At the time Plaintiffs applied for their business license, they were informed by an official of the City of Henderson that there was no place in the City of Henderson were one could lawfully operate an adult bookstore and motion picture arcade. Therefore, if their application described the business as an adult business, Defendant City of Henderson would be compelled to deny the application.

39. On August 31, 1989, Plaintiffs submitted a written application on a form provided by the City of Henderson. Under the heading "General Information", Plaintiffs provided the following statement "Nevada Entertainment Industries dba Fantasy

Video Plus."

40. Under the heading "Occupancy Use Information" (type of business), Plaintiffs provided the following description:

"Mass media books and video store; novelty shop, etc."

41. On September 21, 1989, Defendant City of Henderson issued a revenue business license to Plaintiffs.

42. On or about December 5, 1989, Defendant City of Henderson re-zoned Plaintiffs' property at 1100 Boulder Highway, Henderson, NV from CC to CH. By rezoning Plaintiffs' property from CC to CH, Defendant City of Henderson determined that an adult bookstore and arcade could theoretically be operated at said location, thereby ostensibly eliminating one ground for invalidating the regulatory scheme for adult bookstores and arcades; that is, as of December 5, 1989, Defendant City of Henderson no longer purported to totally ban adult bookstores and arcades from the City of Henderson (thereby purporting to comply

with Schad v.Borough of Mount Ephraim, 452 U.S. 61, 68 L.Ed.2d 671, 101 S.Ct. 2176 (1981).

43. However, although Defendant City of Henderson re-zoned Plaintiffs' property from CC to CH, Defendant City of Henderson still required a business license and a conditional use permit for the operation of an adult bookstore and motion picture arcade.

44. Defendant City of Henderson does not want any adult bookstores or motion picture arcades to be located anywhere within its territorial jurisdiction, but also does not want any court to invalidate its regulatory scheme. As a result, Defendant City of Henderson wants to create the impression that it allows such businesses when in fact it does not and does not want them.

45. On February 1, 1990, Plaintiffs opened their business and were immediately inspected by Defendant City of Henderson.

46. Defendant City of Henderson

concluded that Plaintiffs opened an adult bookstore and arcade. Because Defendant City of Henderson did not want such a business to operate anywhere within its City limits, Defendant City of Henderson took two actions to close Plaintiff's business. It introduced and, on March 13, 1990, adopted ordinance No. 1160, purporting to regulate "sexually oriented business."

47. Ordinance No. 1160 amended Title 4 of the Henderson Municipal Code by establishing Chapter 4.110. In essence, newly adopted Chapter 4.110, requires adult businesses (including Plaintiffs' business) to obtain a license; however, it would preclude a business such as Plaintiff's business from operating within 1000 feet of a place where alcoholic liquor is sold. Plaintiffs' business is within 1000 feet of a place where alcoholic liquor is sold but the ordinance creates a non conforming us for those businesses operating lawfully on March 15, 1990 (for a period of six months). Accordingly, while the adoption of Ordinance

No. 1160 reveals the obvious intent by the Defendant City of Henderson to shut down Plaintiffs' business, arguably Ordinance No.1160 has not yet affected Plaintiffs' business. There are other remedies provided by Ordinance No. 1160, and therefore the specific provisions of Ordinance No. 1160 will not be further discussed. Plaintiffs are not sure how the distance restriction will be determined and measured.

48. In addition to adopting Ordinance No. 1160, Defendant City of Henderson on March 13, 1990 initiated a proceeding to revoke Plaintiffs' business license.

49. Although Plaintiffs believe and still believe and contend that the ordinances of the City of Henderson purporting to regulate adult bookstores and arcades are facially invalid, out of an abundance of caution Plaintiffs decided to participate in an administrative proceeding provided by Defendant City of Henderson with respect to the revocation issue. The revocation hearing was conducted by the City

Council of the City of Henderson on April 10, 1990. After conducting the hearing, Defendant City of Henderson voted to revoke Plaintiffs' business license. At said hearing, Plaintiffs contended, unsuccessfully, that the regulatory scheme and the ordinances quoted above violated plaintiffs' rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs objected to the revocation of their business license. The decision to revoke the license was arbitrary, invalid, and based upon incompetent and irrelevant evidence, and based upon an invalid ordinance. Plaintiffs made no material misrepresentations on their application. Had the information been presented which Defendant City of Henderson purportedly requested, it would not have been material to any valid criteria for granting or denying the license.

50. After the hearing conducted on April 10, 1990, Defendant City of Henderson purported to revoke Plaintiffs' business

license. A copy of the Decision and Order revoking the business license on April 16, 1990 is attached hereto as Exhibit 1.

51. The decision of April 16, 1990 takes effect on or about May 1, 1990.

52. Thus, as of May 1, 1990, unless this Court restrains the revocation or restrains enforcement of the ordinance, Plaintiffs will have to shut down their business. Plaintiffs contend that the business license ordinance and the conditional use permit ordinance are unconstitutional facially. Accordingly, it is probably not necessary for Plaintiffs to retain their business license. Instead, Plaintiffs have standing to challenge the facial validity of said ordinances.

53. Although unnecessary, Plaintiffs did exhaust available administrative remedies before the Henderson City Council.

54. Defendant James Goff was and is the Chief of Police of the City of Henderson. If Plaintiffs do not have a business license and/or conditional use

permit, Defendant James Goff, Chief of Police of the City of Henderson, will arrest, and/or cite Plaintiffs and their employees, in violation of their rights under the First and Fourteenth Amendments to the United States Constitution. Plaintiffs, accordingly, will be forced to close their business protected by the First and Fourteenth Amendments to the United States Constitution, unless this Court grants equitable relief as requested herein.

55. In addition to the Chief of Police, the Henderson Municipal Code also authorizes other City of Henderson officials to arrest and/or cite Plaintiffs. This would include the Director of Licensing, and agent and employee of Defendant City of Henderson.

56. Plaintiffs are without a legal remedy in the ordinary course of law. The threat of criminal enforcement of the Henderson Municipal Code against Plaintiffs by Defendants, is and will have a chilling affect on their First and Fourteenth

Amendment rights. They will be forced to close their business unless this Court grants a temporary restraining order, preliminary injunction, and permanent injunction.

57. Defendant City of Henderson has been since April 4, 1989, and still is, enforcing an unconstitutional regulatory scheme designed to preclude the operation of adult bookstores and motion picture arcades.

58. Plaintiffs business is located in the appropriate zone. If, in fact, it will become unlawful by virtue of Ordinance No. 1160 in six months, which Plaintiffs do not concede, then Defendant City of Henderson will also have unduly restricted the available locations wherein an adult business can be located, also in violation of the First and Fourteenth Amendments to the United States Constitution, but this particular challenge may be premature. If not, Plaintiffs are also attacking the constitutionality of Ordinance No. 1160 in this proceeding to the extent Defendants,

and each of them, attempt to enforce it.

59. Plaintiffs have been forced to retain an attorney to represent them in thisproceeding. If successful, Plaintiffs will pray for an award of attorney's fees pursuant to Title 28, United States Code, Section 1988.

60. A dispute has arisen among the parties with regard to the constitutionality of Ordinance Nos. 1112, 1120, and 1160 of the City of Henderson and actions taken by Defendant City of Henderson and threatened by Defendant City of Henderson and its Chief of Police. Accordingly, it is appropriate for this Court to render a declaratory judgment considering the constitutionality of various provisions and threatened actions and revocation proceedings of Defendants.

61. Unless this Court grants immediate relief, Plaintiffs will suffer irreparable injury in that they will be forced to close their business and be precluded from selling, renting, and exhibiting motion picture films, video tapes, and books and

magazines protected by the First and Fourteenth Amendments to the United States Constitution.

WHEREFORE, PLAINTIFFS PRAY FOR JUDGMENT AS FOLLOWS:

1. For a temporary restraining order, preliminary injunction, and permanent injunction restraining Defendants, and each of them, from attempting to or from enforcing ordinances against Plaintiffs which would cause them to close their business at 1100 Boulder Highway, Henderson, NV;

2. For a temporary restraining order, preliminary injunction, permanent injunction, restraining Defendants and each of them, from revoking or enforcing the revocation of Plaintiffs' business license;

3. For declaratory judgment that Plaintiffs have the right to continue operating their business, as currently constituted, at 1100 Boulder Highway in Henderson, Nevada;

4. For declaratory judgment that

Defendant City of Henderson may not enforce its ordinances against Plaintiff's business at 1100 Boulder Highway, Henderson, Nevada;

5. For attorney's fees according to proof;

6. For such other and further relief as the court deems just and proper.

DATED: April 23, 1990

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Plaintiff

AFFIDAVIT OF DANIEL BISHOP

State of Nevada)
) SS
County of Clark)

Daniel Bishop, first being duly sworn, deposes and says:

1. I am the President of Nevada Entertainment Industries, Inc. and am also co-Plaintiff in this action. I have read the foregoing Complaint and the facts stated therein are true and correct to the best of my knowledge. If called upon as a witness, I could competently testify to such facts and I will be available for cross-examination by Defendants' counsel at the hearing on the request for temporary restraining order and at the hearing on the request for preliminary injunction.

_____

DANIEL BISHOP

BEFORE THE CITY COUNCIL OF THE

CITY OF HENDERSON

COUNTY OF CLARK,

STATE OF NEVADA

* * *

In the Matter of the Disciplinary Action Against the Business License of NEVADA ENTERTAINMENT INDUSTRIES, INC., DANIEL BISHOP and FRANCISCO S. VILLALPANDO d/b/a FANTASY VIDEO PLUS	)	DECISION AND ORDER

The CITY COUNCIL of the CITY OF HENDERSON, having heard and considered all the evidence presented at the business license revocation hearing in the above-entitled matter on April 10, 1990, makes the following findings of fact and determination of issues, and renders its final decision as follows:

1.) The evidence shows the licensees originally advised the CITY the videos were "adult";

2.) When licensees were told they needed a zone change and use permit to operate as an adult video business, the

licensees changed their application to reflect "mass media video/book and novelty" with the full intention to proceed as an adult video, book and novelty store;

3.) The licensees changed their application with the full intention to misrepresent and mislead the Business License Department in order to open for business without obtaining a zone change and use permit;

4.) The use of the term "mass media" was done to deliberately mislead and deceive the City staff in order to cause a business license to be issued;

5.) The licensee answered in the negative questions regarding previous convictions on the business license application which affects his credibility and is itself a misrepresentation;

6.) The evidence showed the business consisted of predominantly, 75-80%, adult materials;

7.) The omission by licensees of the nature of the business was done deliberately

to mislead and deceive City staff in order to have a business license issued without applying for a zone change and use permit;

8.) The licensees offered no evidence to refute any of the evidence offered by the CITY regarding arrests or misrepresentation of the nature of the store's business;

9.) The licensee tried to divert attention from the limited issues at hand which is the misrepresentation of the nature of the business to the Business License Department;

10.) Each of the witnesses who testified were credible and their testimony truthful;

Based on the foregoing findings and conclusions, the CITY COUNCIL hereby revokes the business license of NEVADA ENTERTAINMENT INDUSTRIES, INC., d/b/a FANTASY VIDEO PLUS, orders written notice of its decision to licensees within five (5) business days, and stays the enforcement of the revocation for ten (10) business days following receipt of

the written notice of revocation.

DATED this 16th day of April, 1990.

CITY COUNCIL OF THE CITY OF HENDERSON

_____
LORNA KESTERSON, Mayor

_____
ANDY HAFEN

_____
CARLTON LAWRENCE

_____
DOROTHY VODENBRINK,
CMC, City Clerk

_____
MICHAEL HARRIS

_____
LORIN WILLIAMS

APPENDIX 3

COPY OF QUESTIONS I & 1V IN PETITION FOR WRIT OF CERTIORARI IN NO. 92-643, AT pp. i-iii.

[Refer: page 9 of Reply Memorandum.]

Text at page 9 reads:

"A legal Conclusion of Law that the U.S. District Court for the District of Nevada did not have 'subject matter jurisdiction' on April 24, 1990, must, of necessity, follow from the 'command' of the Eleventh Amendment! The U.S. District Court and the U.S. Court of Appeals for the Ninth Circuit are required to acceed to that 'command' in all cases in which a proper Huffman type abstention defense has been asserted. That the City of Henderson is asserting a proper Huffman challenge, see Huffman, supra, at fn. 14, which cites and relies upon this Court's decision in Watson v. Buck, 313 U.S. 387(1941). See also Questions I & IV in the petition for writ of certiorari in Case No. 92-643 at pp. i-iii, a copy of which is attached at Appendix 3 to this Brief."

Question I reads: "Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. Dist. Court has not found the "extraordinary circumstances" which the 11th Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie?"

Question IV reads: "Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Sec.1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

I

Whether, under Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), the United States District Court must defer to the state court judicial system by abstaining and dismissing the federal civil rights action which seeks to enjoin enforcement of the Henderson City Council's quasi-judicial order which revoked the federal plaintiffs' business license based on the City Council's finding of a fraudulent business license application, which order was pending in the state system and had been issued and served prior to the filing of the civil rights lawsuit, where the federal plaintiffs have failed to plead and prove, and the U.S. District Court has not found the "extraordinary circumstances" which the Eleventh Amendment and this Court in Huffman, supra, require for federal jurisdiction to lie.

II

Whether under University of Tennessee v. Elliott, 478 U.S. 788 (1986), the U.S.

District Court must grant the City's motion to dismiss the civil rights action because of the res judicata and/or collateral estoppel effect which the unreviewed City Council's quasi-judicial finding of fraud in the submission of the federal plaintiffs' business license application and the unreviewed City Council's order revoking their business license has on the federal plaintiffs' constitutional claims, where federal plaintiffs have had an adequate opportunity to fully litigate all constitutional issues within the Nevada state judicial system.

III

Whether the Huffman abstention issue which has been framed is:

(1) jurisdictional; and

(2) requires application of the collateral estoppel and res judicata principles expressed in University of Tennessee v. Elliott, supra, to the unreviewed City Council quasi-judicial

finding of fraud in federal plaintiffs' business license application and to the unreviewed City Council quasi-judicial order of license revocation; so as to mandate a dismissal of the federal civil rights action, and bar any consideration of the "reservation" doctrine expressed in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). See Huffman, at 499, fn. 2.

IV

Whether this Court should establish a "heightened pleading" requirement for those plaintiffs who seek federal relief in civil rights complaints brought pursuant to 42 U.S.C. Section 1983, which trigger abstention issues and the doctrines established by this Court in Huffman v. Pursue, Ltd., supra, and Watson v. Buck, 313 U.S. 387 (1941).

APPENDIX 4

COPY OF CITY OF LAS VEGAS V. NEVADA INDUSTRIES, INC., 772 P.2d 1275 (NEV. 1989).

[Reference: page 18 of Reply Memorandum.]

Text at page 18 reads:

"Petitioner contends herein that Nevada Entertainment's deliberate attempt to use the federal courts to obtain a federal decree and rule of law which is contrary to the express holding of the Nevada Supreme Court in City of Las Vegas v. Nevada Industries,Inc., 772 P.2d 1275 (Nev.1989), see copy at Appendix 4, and is a patent violation of the Eleventh Amendment, which amendment was specifically adopted by the States in 1792 to preclude the use of the federal court system as was done in this case. See Cross-Petition of City of Henderson in Nevada Entertainment Industries, Inc. et al. v. City of Henderson, et al., No. 94-786."

[CONTENTION: The City of Las Vegas case, supra, specifically held one year earlier (April 25, 1989), that, in the State of Nevada, an adult bookstore which obtains its business license by deception may not obtain the judicial relief Nevada Entertainment seeks (in Questions 1-3 of its Petition for Writ of Certiorari in 94-786) in the quasi-judicial proceedings which are brought by the State to revoke its license for fraud in its business application.]

Question 1 reads: "May a city violate the first and Fourteenth Amendments (free speech) by shutting down an adult bookstore pursuant to an unconstitutional zoning ordinance because the bookstore obtained its business license by deception?" Question 2 reads: "Is an adult bookstore without constitutional protection vis-a-vis an invalid zoning ordinance because it obtianed its business license by deception?" Question 3 reads: "To prove that a city utilizes an unconstitutional zoning scheme to ban all adult bookstores, may an adult bookstore employ deception in obtaining a business license?"

Nevada Entertainment's filing of its Petition for Writ of Certiorari in 94-786 is frivolous because the federal court below lacked subject matter jurisdiction under the 11th Amendment violation.

SUPREME COURT OF

NEVADA

CITY OF LAS VEGAS, Nevada,	CASE NO. 18491
Appellant,	OPINION.
v.	DATED: April 25, 1989
NEVADA INDUSTRIES, INC., a Nevada Corporation,	
Respondent.	

Business challenged city's revocation of its business licenses. The Eighth Judicial District Court, Clark County, Joseph S. Pavlikowski, J., issued permanent injunction and writ of mandamus prohibiting enforcement of business license ordinances against business, and city appealed. The Supreme Court, Young, C.J., held that: (1) misrepresentation in license applications that business was not sexually oriented justified revocation of licenses, and (2) ordinance provision serving as basis for imposition of fine against business was invalid.

Affirmed in part and reversed in part.

1. **Licenses:**

Falsely representing on applications for business licenses that business was not sexually oriented justified city's revocation of business licenses pursuant to municipal code, irrespective of any First Amendment interests. U.S.C.A. Const.Amend. 1.

2. **Municipal Corporations:**

While municipalities generally enjoy power to enforce their ordinances using fines, such ordinances must fix valid maximum penalty.

3. **Municipal Corporations:**

Standardless ordinance invites discriminatory enforcement.

4. **Licenses:**

Municipal Code provision authorizing imposition of penalty upon business, determined to have misrepresented its status as sexually

oriented business in application for business licenses, was invalid, as it vested city officials with unlimited discretion to establish fines and posed great risk of excessive fines. Const. Art. 1, §6.

5. Licenses:

Municipal Corporations:

Portions of penalty provision of municipal business license ordinances determined to be invalid for failing to establish valid maximum fine could be severed without defeating objectives of ordinance and, therefore, validity of remaining portions of ordinance would be sustained. Const. Art. 1, §6.

George F. Ogilvie, City Atty., Robert Yeargin and Val Steed, Deputy City Attys., Las Vegas, for appellant.

Alan B. Andrews, Las Vegas, For respondent.

OPINION

YOUNG, Chief Justice.

This action arose out of the appellant Las Vegas City Council's (Las Vegas) decision to revoke respondent Nevada Industries' business licenses. Nevada Industries operates a lounge facility with a jacuzzi and meeting rooms. A detective observed nudity and the exposure and touching of female breasts during a visit to the facility.

After an investigation and a hearing, Las Vegas revoked the business licenses because it found that Nevada Industries is a sexually oriented business, i.e. a "nude show." Consequently, it found that respondent made a misrepresentation on its application for business licenses by stating that it would not operate a sexually oriented business.[1] Moreover, Las Vegas found that Nevada Industries violated a Las Vegas zoning ordinance prohibiting the establishment of a sexually oriented business within one thousand feet of another sexually oriented business, church, school, park or playground.[2] Las Vegas also found

that Nevada Industries violated ordinances concerning the keeping of business records and failed to properly maintain its State Industrial Insurance System (SIIS) coverage. Pursuant to these findings, Las Vegas revoked Nevada Industries' business licenses and fined respondent $50,000.[3]

On Nevada Industries' motion, the district court issued a writ of mandamus and reviewed Las Vegas' actions. The district court concluded that Nevada Industries' activities enjoyed First Amendment protection because Las Vegas sought to regulate them as a "nude show." The court found the applicable ordinances unconstitutional as applied to this protected activity, and issued a permanent injunction and a writ of mandamus prohibiting their enforcement against Nevada Industries. Las Vegas appeals from the district court's judgment.

[1] Las Vegas' finding that Nevada Industries' activities constituted a nude show provided the basis for its conclusion

that Nevada Industries made misrepresentations on its application for a business license, and for its finding that Nevada Industries violated Las Vegas' zoning ordinance by operating within one thousand feet of another sexually oriented business. LVMC §19.74.020(I) addresses sexually oriented businesses, and defines "nude show" as "any establishment which provides or permits sexual conduct or the display of specified anatomical areas upon its premises as entertainment or as an attraction for business." The provision also defines adult motion picture theaters, adult bookstores, and similar establishments as sexually oriented businesses. Las Vegas correctly points out that the sucking of a woman's breast by a man, as observed by one of its detectives, constitutes "sexual conduct" under LVMC §19.74.010(A)(1) as do other actions which the detective observed.

Nevada Industries' facilities and advertising support the conclusion that it intended to operate in its present manner

(i.e. as a sexually oriented business) at the time it applied for its business license. Therefore, the record demonstrates that Nevada Industries falsely represented on its license application that it was not a sexually oriented business.

Consequently, we conclude that we need not address the issue of whether Nevada Industries' activities enjoy First Amendment protection because respondent's affirmative misrepresentation formed the basis for the revocation of its licenses. Accordingly, without addressing the First Amendment issues raised by respondent, we hold that Las Vegas acted within its discretion when it revoked Nevada Industries' business licenses pursuant to the Las Vegas Municipal Code.

Because Las Vegas determined that Nevada Industries' operation included a "nude show," the district court held that this case must turn upon First Amendment principles. According to the United States Supreme Court, under some circumstances,

nude dancing might be entitled to First and Fourteenth Amendment protection. California v. LaRue, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972). Thus, the district court concluded that Las Vegas' licensing procedures must meed the strict constitutional standards imposed on all statutes which impinge upon First Amendment rights. We disagree.

Las Vegas characterized the entertainment provided by Nevada Industries as "nude show" in order to demonstrate that respondent made misrepresentations on its business license applications. Las Vegas revoked Nevada Industries' business licenses not because of the forms of expression which occurred at their operations, but for the simple reason that respondent perpetrated a fraud upon Las Vegas. Therefore, Nevada Industries' First Amendment rights are not dispositive of this case.

We note that under our decision in this case, Nevada Industries remains free to reapply for new business licenses. However,

should they continue to operate as a sexually oriented business, Las Vegas Municipal Code section 19.74.030 provides a basis for denying their licenses.

Accordingly, we reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business licenses. However, we affirm the district court insofar as it enjoined the imposition of Las Vegas' $50,000 fine upon respondent.

[2-5] According to Las Vegas Municipal Code section 6.88.120, after a hearing on a dispute, the board of commissioners shall render a decision on the merits, including "the penalty to be imposed, if any." After concluding that Nevada Industries violated Las Vegas' business licensing ordinances, the board of commissioners fined respondents $50,000.

Generally, municipalities enjoy the power to enforce their ordinances using fines. Commonwealth v. Cabell, 199

Pa.Super. 513, 185 A.2d 611, 616 (1962). However, the ordinance must fix a valid maximum penalty. Verona v. Shalit, 96 N.J.Super. 20, 232 A.2d 431, 433 (App.Div.1967). Because the penalty provision of section 6.88.120 fails to provide any limitation on the fines imposed, that clause is void. Id.

Municipal ordinances must not be oppressive. Hunter v. City of Atlanta, 212 Ga. 179, 91 S.E.2d 338, 340 (1956). In its present form, section 66.88.120 is invalid because it vests Las Vegas officials with unlimited discretion to establish fines. A standardless ordinance invites discriminatory enforcement. Baer v. City of Wauwatosa, 716 F.2d 1117, 1124 (7th Cir.1983). Because of the great risk of excessive fines resulting from enforcement of the penalty provision, it cannot stand.[4] Nev. Const. art. 1, §6.

When invalid provisions of a municipal ordinance are severable without defeating the objectives of the ordinance, we sustain

and give effect to valid portions of the ordinance.[5] City of Portland v. Dollarhide, 71 Or.App. 289, 692 P.2d 162, 167 (1984). Accordingly, we sustain the validity of the remaining portions of section 6.88.120.

Therefore, we affirm the judgment of the district court insofar as it enjoins the imposition of Las Vegas' fine on Nevada Industries, and reverse that portion of the district court's decision which permanently enjoined Las Vegas from using its municipal ordinances to revoke Nevada Industries' business license.[6]

STEFFEN, SPRINGER and MOWBRAY, JJ., concur.

1/ Las Vegas Municipal Code §6.02.330 provides in part:

> 6.02.330 **Disciplinary action-Good cause designated.** The licensee may be subject to disciplinary action by the Board of Commissioners for good cause, which may include, but is not limited to:
>
> (A) The application is incomplete or contains false, misleading or fraudulent statements with respect to any information required in the application;

(B) The licensee or any of its principals fails to satisfy any qualification or requirement imposed by this Code, or other local, State or Federal Law or regulation pertaining to the particular license or approval for suitability sought or held;

. . . .

(F) The licensee or any of its principals has committed acts which would constitute a crime involving moral turpitude, or involving any Federal, State or local law or regulation relating to the same or a similar business;

(G) When substantial information exists which tends to show that the licensee or any of its principals is dishonest or corrupt;

. . . .

(I) The actual business activity constitutes a public or private nuisance, or will be or is conducted in an unlawful, illegal or improper manner;

. . . .

2/ In Young v. American Mini Theatres, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Supreme Court upheld the constitutionality of a zoning ordinance similar to that implemented by Las Vegas in this case. The Court noted that the mere fact that commercial exploitation of material arguably protected by the First Amendment is subject to zoning and other licensing criteria is an insufficient reason for invalidating these ordinances. Id. at 62, 96 S.Ct. at 2448. Moreover, we must give great respect to Las Vegas' interest in preserving the quality of urban life and to

2/ Cont.
its need to experiment with solutions to difficult problems. Id. at 71, 96 S.Ct. at 2452-53. Thus, we find that the zoning ordinance implicated in this case is constitutional.

3/ The City imposed the fine pursuant to Las Vegas Municipal Code §6.88.120 which provides that:

> 6.88.120 Decision by Board. After the hearing of a contested matter, the Board of Commissioners shall render a decision on the merits which shall include findings of fact and conclusions of law and the penalty to be imposed, if any, and shall thereafter make and enter its order in its minutes in conformity to such decision. The decision of the Board shall be served on the parties personally or shall be sent to them by registered or certified mail. The decision shall become and remain effective upon such service unless the Board shall otherwise order.

4/ According to NRS 193.170, whenever a statute prohibits the performance of any act but fails to impose a penalty for the violation thereof, commission of the act shall be a misdemeanor.

5/ We note that the vague penalties referred to in section 6.88.120 can easily be clarified by amendment.

6/ The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.